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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TADAO MARQUIS HENNING,

Defendant and Appellant.

A155037

(Solano County
Super. Ct. No. VCR217577)

Appellant Tadao Marquis Henning was sentenced to nine years in prison after he was convicted of first degree burglary. He argues on appeal that the trial court erred when it continued trial in Henning's absence more than a month after a recess was called when Henning left the trial for medical reasons. We reject the argument and affirm. But we remand to the trial court to resentence Henning in light of Senate Bill No. 1393, which granted trial courts the discretion not to impose a sentencing enhancement under Penal Code section 667, subdivision (a).¹

I.
FACTUAL AND PROCEDURAL
BACKGROUND

Because Henning does not challenge the weight of the evidence supporting his conviction, we limit our summary to matters affecting his absence at trial. Henning participated in a home burglary in Vallejo on September 19, 2012. He crashed his car when fleeing from police after the crime and reportedly was in a coma for two weeks. As

¹ All statutory references are to the Penal Code.

a result of the crash, he apparently suffered a collapsed lung, and tubes were placed in his chest.

Henning was charged by felony information with first degree residential burglary (§ 459), with an allegation that he previously had been convicted of a serious felony (former § 667, subd. (a)). He was released on bail early in the proceedings and was not in custody when trial began in April 2016. A jury was empaneled on April 27, and the first witnesses testified that same day. Henning arrived late to court the next morning, April 28. His attorney explained that Henning was delayed in traffic because of an overturned big-rig and that “as your Honor can tell, he did run in here and is remorseful for being late.” Trial continued and Henning’s attorney resumed her cross-examination of the burglary victim. After redirect examination, two other witnesses testified.

After cross-examination of the second witness had begun, the trial court dismissed jurors for their morning break. During a discussion between the court and the parties about the admission of an exhibit, Henning’s counsel asked Henning, “Are you okay?” Henning had his head down on a table and said, “I need some air.” His attorney stated that “I know when he was rushing to get here, he had a difficult time breathing. So I think as a result of that he’s suffering some pain or something.” The trial court called a recess. When proceedings resumed around noon, Henning’s attorney reported that after the trial judge left the bench, Henning got up, stumbled, and began to shake. Medics were summoned, and they gave Henning oxygen and took him to the hospital. The trial court called a recess until the following morning. Henning’s attorney visited Henning in the emergency room at the Kaiser medical facility in Vallejo and briefly spoke with him. It was the attorney’s understanding that medical staff told Henning the organs around the tube in his chest were possibly inflamed, and that he might be transported to Oakland. (Documentation later submitted in connection with Henning’s motion for a new trial confirmed that Henning was treated at Oakland’s Kaiser Hospital for about an hour and a half on April 29.)

When proceedings resumed the following morning (April 29), Henning’s counsel shared what she knew about Henning’s status. She also requested that the trial court

declare a mistrial, and the trial court denied the request without prejudice. The trial court continued trial until June 3 (a little over a month away). The trial court also scheduled a status conference for May 23.

Henning did not appear at the hearing on May 23 (a Monday). He had told his attorney's assistant that he thought he did not have to appear in court until June 3, the scheduled date for trial. The trial court asked the parties to return to court on Friday (May 27), to ensure that Henning would be available for trial on June 3.

Henning again did not appear when court reconvened on May 27. His attorney reported she had left two voice messages the previous day for Henning and he had left one with her assistant, but they had never actually spoken. On the day of the hearing, the electric power was out at the attorney's office and the phones were not working, so she could not tell whether he had tried to call that morning. The trial court expressed frustration with counsel for both parties that they did not have further information regarding Henning's current medical status. The court confirmed that trial would begin on June 3, and it explained that it would decide then whether Henning had voluntarily absented himself if he failed to show up.

When court reconvened on June 3, Henning again was not present. The prosecutor reported that he had called five hospitals in the Oakland area but could not locate Henning. He argued that Henning had voluntarily absented himself from trial and that trial should continue in Henning's absence. Henning's counsel disagreed. She argued that the court could not infer that Henning had voluntarily absented himself because Henning had attended all court appearances up until he suffered a medical emergency and had stated his desire to testify. Counsel also reported that Henning told her he had been mistakenly arrested at some point in late May, possibly because a family member had used his name, which may also have affected his ability to attend court. Counsel asked that the trial court declare a mistrial.

The trial court declined to declare a mistrial. The court stated it was unclear what, if anything, was preventing Henning from coming to court, but at that point the court would find that Henning had voluntarily absented himself and that trial would continue in

his absence. The court said, however, that when Henning reappeared, he would be provided the opportunity to explain his absence and file a motion for a new trial.

Trial resumed that same morning, and the jury began their deliberations in the afternoon. Less than two hours later, the jury convicted Henning of first degree burglary. The court held a brief jury trial on the allegation that Henning had previously been convicted of a serious felony (former § 667, subd. (a)), and the jury found the allegation true. The trial court issued an arrest warrant for Henning, and proceedings concluded. Although the record is not entirely clear on what happened next, Henning was apparently arrested more than four months later, in late October 2016.

According to the trial court's minute orders, Henning first appeared in court on October 31, 2016, and the matter was continued several times. At a hearing on January 30, 2017, Henning's attorney declared a conflict and was relieved as counsel. Proceeding with a different appointed attorney, Henning filed a motion for a new trial. (§ 1181.) He argued that he was deprived of his due process right to be present for his trial and that he was not voluntarily absent from the trial (§ 1043). Henning provided the hospital records showing he had been treated at Kaiser in Oakland on April 29, the day after he left court for medical reasons. He also provided a Kaiser document titled "Work Status Report" stating that Henning "is placed off work from 5/22/2016 through 6/8/2016" (a period from the day before the status hearing to check on his condition to a few days after his trial resumed). The letter listed an "Encounter Date" of March 29, 2017, the week before the motion for a new trial was filed. The trial court concluded that the evidence presented failed to establish that Henning had not voluntarily absented himself from trial, and it denied Henning's motion for a new trial.

Because of a prolonged absence of the trial judge who oversaw Henning's trial and the motion for new trial, a different judge sentenced Henning. The prosecutor agreed with the probation department's recommendation for Henning to be sentenced to the aggravated term of six years. The court stated it was "a little torn" about which sentence to select for the burglary count. It understood the argument for imposing the aggravated sentence, but it also noted that Henning would be serving "an extra five years because of

the prior.” “[I]n light of the totality of the circumstances,” the court sentenced Henning to the midterm of four years for his burglary conviction (§ 461, subd. (a)) and imposed what was then a mandatory five-year enhancement for the prior serious felony (former §§ 667, subd. (a), 1385, subd. (b)), for a total of nine years in prison. This timely appeal followed.

II. DISCUSSION

A. The Trial Court Did Not Err When It Concluded That Henning Was Voluntarily Absent from Trial.

Henning argues that the trial court erred in denying his motion for a new trial because he was not voluntarily absent from trial and was denied his constitutional right to present a defense. We are not persuaded.

Both the federal and state Constitutions protect a criminal defendant’s right to be present at trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) “A defendant’s right to presence, however, is not absolute. The [U.S. Supreme Court] has stated that a defendant’s ‘privilege may be lost by consent or at times even by misconduct.’ ” (*Gutierrez*, at p. 1202, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 106.)

After a noncapital felony trial has started in a defendant’s presence, the defendant’s absence shall not prevent the continuation of the trial up to and including verdict where the defendant is “voluntarily absent.” (§ 1043, subd. (b)(2).) The statute “was designed to prevent the defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself. A crucial question must always be, ‘Why is the defendant absent?’ This question can rarely be answered at the time the court must determine whether the trial should proceed. Consequently, in reviewing a challenge to the continuation of a trial pursuant to Penal Code section 1043, subdivision (b)(2), it must be recognized that the court’s initial determination is not conclusive in that, upon the subsequent appearance of the defendant, additional information may be presented which either affirms the initial decision of the court or

demands that defendant be given a new trial. It is the totality of the record that must be reviewed in determining whether the absence was voluntary.” (*People v. Connolly* (1973) 36 Cal.App.3d 379, 384-385.) “On appeal the reviewing court must determine, on the whole record, whether defendant’s absence was knowing and voluntary.” (*Id.* at p. 385.) “The determination of the reviewing court *must* be based upon the totality of the facts; not just a portion of them.” (*Ibid.*)

The totality of the record supports the trial court’s ruling. In arguing to the contrary, Henning first claims that there were insufficient facts before the trial court on the date that trial continued in his absence to establish a prima facie showing of voluntary absence. (*People v. Connolly, supra*, 36 Cal.App.3d at p. 385 [when examining initial proceedings involving determination to proceed with trial, “sufficient facts must be before the court to establish what reasonably appears to be a prima facie showing of voluntary absence”].) The *Connolly* court observed that in the “usual case a continuation of at least a few hours in order to locate defendant is appropriate.” (*Ibid.*) Here, we accept that it may have constituted error if the trial court had continued the trial the day after Henning left the courtroom for medical reasons. But the trial court instead continued trial for *nearly four weeks* to allow time for Henning to appear. And when Henning failed to appear for the first hearing to check on his status, the court *again* continued the matter to allow more time to notify Henning of the necessity of appearing. At the time the trial court first concluded that Henning had voluntarily absented himself from proceedings, it had information that Henning was aware of the need to appear for trial on June 3 and was able to leave messages with his lawyer’s assistant, and the court was open to the possibility that additional information could later support a motion for a new trial.

We disagree with Henning’s argument that the information he provided when he finally appeared before the court supported a finding that his absence had been involuntary. He focuses on the doctor’s letter stating he was “placed off work from 5/22/2016 through 6/8/2016.” Even if we put aside the prosecutor’s concerns below about the timing of the letter’s preparation, we agree with the trial court that the letter did

not contradict a finding that Henning was voluntarily absent from trial. It does not explain Henning’s absolute failure to communicate any medical issues he may have been experiencing until after he was arrested around four months after trial concluded.

In light of our conclusion that the trial court did not err, we need not address Henning’s argument that he was prejudiced.

B. The Case Must Be Remanded for Resentencing.

At the time Henning was sentenced in July 2018, the trial court was required under section 667, subdivision (a), to impose a five-year consecutive term for any person convicted of a serious felony who previously had been convicted of a serious felony, and the court had no discretion to strike any prior conviction for purposes of enhancement of a sentence under the statute. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) “On September 30, 2018, the Governor signed Senate Bill No. 1393, effective January 1, 2019, [which amended] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)” (*Ibid.*) The amendments apply retroactively to convictions not yet final when Senate Bill No. 1393 became effective on January 1. (*Garcia*, at p. 937.)

Henning argues, and respondent concedes, that the case must be remanded to allow the trial court to exercise its discretion under amended section 667, subdivision (a). (E.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428 [remand appropriate where no clear indication of trial court’s intent not to strike an enhancement].) We therefore remand to the trial court for resentencing.²

² Respondent contends that “it appears highly unlikely that the trial court would strike the prior serious felony enhancement[] in this case, given it was ‘torn’ between the sentence imposed and a higher one, and given its concern for appellant’s commitment to a recidivist lifestyle.” We note, however, that the trial judge who oversaw Henning’s trial at one point seemed open to dismissing the case when it was unclear where Henning had gone after he left trial for medical reasons. The court observed that “here’s a guy that seems to have nearly killed himself trying to escape from this crime,” and asked the prosecutor, “Do you want to dismiss it[?]” and “Hasn’t he been punished enough?”

III.
DISPOSITION

The matter is remanded to the trial court with directions to resentence Henning under sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393. (*People v. Garcia, supra*, 28 Cal.App.5th at p. 974.) In all other respects, the judgment is affirmed.

Humes, P.J.

WE CONCUR:

Margulies, J.

Sanchez, J.

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